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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,
PETITIONER,

v.

IVORY J. TOWNES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether a Fourth Amendment seizure inevitably occurs whenever a person agrees to accompany police officers for questioning but is not expressly told that he is free to refuse.

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District, which reversed defendant's convictions for Rape, Deviate Sexual Assault, and Home Invasion, and remanded the causes for a new trial, is reported at 94 Ill. App.3d 850, 419 N.E.2d 604 (4th Dist. 1981) (See Appendix B). The opinion of the Supreme Court of Illinois, which affirmed the appellate court ruling, and as to which review is now sought, is reported at 91 Ill.2d 32, ____ N.E.2d ____ (1982) (See Appendix A).

JURISDICTION

The opinion of the Appellate Court of Illinois, Fourth Judicial District, was filed on March 31, 1981. The Supreme Court of Illinois granted petitioner leave to appeal on October 19, 1981, and on April 16, 1982, that court filed its opinion in this case.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The instant Petition for Writ of Certiorari is being filed within 60 days of the filing of the Illinois Supreme Court's opinion.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV provides, in pertinent part, that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The victim in this case testified that on January 16, 1980, she awoke at approximately 3:00 a.m. to find a man standing in her bedroom doorway. He was holding what appeared to be an iron bar and demanded money. After she complied with his demand, he forced her back into bed and committed the sexual acts which formed the basis for the Rape and Deviate Sexual Assault charges. She further testified that, while she was struggling with the man, she hit him on the head with the iron bar and bit his finger.

The victim stated that, due to the darkness, she had been unable to obtain a good view of her assailant. Soon after the occurrence, however, she was able to give the police a general description. She indicated that the intruder was a short black man with a thin build, a moustache, and an "Afro" hairstyle, and that his lips were "thick and full." Although she was unable to identify the intruder from a series of photographs shown to her by the police, she did point out certain features in the photographs which resembled those of her assailant. (There was no evidence to suggest that the defendant's photograph was included in the collection view by the victim.) On the basis of this information, as well as their knowledge of local people with similar criminal records, the police compiled a list of eight possible suspects.

The defendant's name was included on the list, and he was the fifth man on the list to be questioned. Two Danville, Illinois, police officers visited the defendant's residence in Georgetown, Illinois, at approximately 9:00 a.m. on the day following the offense. After being invited into the house by the

defendant's mother, the officers informed the defendant that they "wished to speak to him at the Danville Police Department." When the defendant asked for their reason, the officers told him that they were investigating an entry into a home and an assault upon a woman. The officers suggested that the defendant drive his own car to the stationhouse at his convenience, but the defendant chose to ride with the officers in the police vehicle, and the officers waited five to seven minutes while the defendant went to another part of the house to wash up before leaving. The defendant arrived at the stationhouse with the officers at 9:30 a.m.

According to the officers, the defendant accompanied them to the police station voluntarily, just as the other men on the list of possible suspects had done, and that the defendant was at all times free to leave. They stated that, as far as they were concerned, the defendant was not a suspect, but was merely a part of the investigation which would include the questioning of several other men. The defendant was not handcuffed, photographed, fingerprinted, searched, stripped, nor restrained in any way.

Upon reaching the stationhouse, the defendant was taken into an interview room where an officer read to him the *Miranda* warnings. He initialed a form indicating that he understood these rights. Subsequently, the police conducted a series of interviews with the defendant. He was read the *Miranda* warnings prior to each session.

During the initial interview, which began at 9:37 a.m. and lasted until 9:50 a.m., the defendant provided an alibi with respect to his whereabouts at the time of the offense. When asked to explain the scratches on his neck, he indicated that he received them while playing with his niece. He also stated that he had a bump on his head because the hood of his car fell on him while he was changing the car's battery.

A second interview was conducted from 10:27 a.m. until approximately 10:45 a.m. The defendant was again asked to explain his wounds, and whether he would consent to a search of his home and car. Pursuant to his consent, an officer searched his car and discovered two iron bars. The officer noticed a red substance on one of them, which a laboratory test later revealed was human blood. During the third interview, which began at 11:30 a.m. and lasted about fifteen minutes, the defendant was asked to display his hands. An officer noticed a mark on his left middle finger, which the defendant claimed was caused by a splinter.

At 1:10 p.m., after a lunch break, a fourth interview, lasting only four minutes occurred, during which the defendant was informed that an iron bar with blood on it was found in his car. The defendant stated that he was using the bar to pry off a battery cable when the car hood fell on him. He was then asked if he would submit to a medical examination, and he indicated that he would. The examination revealed scratches and bruises around the defendant's neck, a bump on his head, and a bruise on his left middle finger. The defendant was then returned to the police station at 4:00 p.m. and placed in a lineup. The victim, however, was unable to identify the defendant as her assailant.

A final interview began at 6:00 p.m., at which time the defendant admitted that he was in the victim's apartment and that he had sexual relations with her. However, he maintained that the relations were consensual and that he did not rape her. He further claimed that the victim was not injured when he left her apartment and he thought that any injuries she received resulted from her bumping into something. Following his oral admissions, one of the officers typed the statement and the defendant then signed it. The interview ended at 10:10 p.m. at which time the defendant was formally charged.

Prior to trial, on April 8, 1980, the defendant filed a motion to suppress the statement which he had made to the police officers on the ground that the statement was the fruit of an unlawful seizure. Following an evidentiary hearing on the motion, the trial court denied the motion to suppress on April 28, 1980. The defendant was subsequently tried before a jury for Rape, Deviate Sexual Assault, and Home Invasion. At the trial, the statement made during the defendant's final interview was admitted into evidence. The defendant took the stand in his own defense and testified that he did, in fact, choke and beat the victim, but he denied that the sexual acts were compelled by his violence. Rather, he said, the sexual relations followed the beating in order for the parties to make up. Guilty verdicts on all counts were returned on May 2, 1980.

The appellate court reversed and remanded the cause for a new trial, holding that the statement made by the defendant to the police should have been suppressed because it was elicited subsequent to an illegal seizure. In so holding, the appellate court found the facts of the present case to be indistinguishable from the facts in *Dunaway* v. *New York*, 442 U.S. 200 (1979).

The Supreme Court of Illinois agreed that the present case was similar to *Dunaway* and affirmed the decision of the appellate court. The court stated that the present case was "clearly distinguishable" from *United States* v. *Mendenhall*, 446 U.S. 544 (1980). It rejected the argument that *Mendenhall* supported a characterization of the questioning as voluntary and, thus, not invoking the protections of the Fourth Amendment. Justice Underwood, joined by Chief Justice Ryan, dissented. They found that the defendant was not "seized" when he was transported to the stationhouse, because he had accompanied the officers voluntarily. They further found that probable cause to detain the defendant arose during the earliest interviews, hence the total length of the interrogations was not

material to the question of whether the defendant was unlawfully seized.

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE DECISION OF THE ILLINOIS SUPREME COURT, WHICH IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF SEVERAL FEDERAL COURTS OF APPEALS, HAS SUBSTANTIALLY LIMITED A POLICE OFFICER'S RIGHT TO QUESTION A CITIZEN ON ANY GROUNDS LESS THAN REASONABLE SUSPICION TO BELIEVE THAT THE CITIZEN IS INVOLVED IN CRIMINAL ACTIVITY.

This case squarely presents an important constitutional question left unresolved by this Court's opinions in *United States* v. *Mendenhall*, 446 U.S. 544 (1980), and *Reid* v. *Georgia*, 448 U.S. 438 (1980). Specifically, does a Fourth Amendment seizure inevitably occur whenever a person agrees to accompany police officers for questioning but is not expressly told that he is free to refuse? In *Mendenhall*, this Court divided on the question, with two Justices finding no seizure, three Justices declining to reach the question, and three Justices concluding that a seizure had occurred. In *Reid*, this Court was again divided on the question, with two members of the Court finding no seizure, three assuming the existence of a seizure in their formulation of the case issue, and three again declining to reach the issue because it had not been raised in the lower courts. While this Court has often referred to the concept of consensual police-citizen encounters, *see, e.g.*, *Morales* v. *New York*, 396 U.S. 102 (1969); *Davis* v. *Mississippi*,

394 U.S. 721 (1969); and *Terry* v. *Ohio*, 392 U.S. 1 (1968), the question has never been conclusively determined. *See United States* v. *Morin*, 665 F.2d 765, 768 n. 8 (5th Cir. 1982).

A majority of the Supreme Court of Illinois found that the facts of this case were sufficienty similar to the situation described in *Dunaway* v. *New York*, 442 U.S. 200 (1979), to require a finding that the defendant was seized. The court found that in both cases the accused had been transported to the stationhouse by the police; the police initially lacked probable cause to arrest the accused but they did not tell him that he was free to leave; and the encounters both exhibited a certain quality of purposefulness. Based on the analogy to *Dunaway*, a majority of the Illinois Supreme Court concluded that the defendant herein had been unlawfully seized and that his subsequent statement to the police was properly suppressed.

Crucial to the court's holding was the belief that *Dunaway* stated the test for determining whether a seizure had taken place. Furthermore, the court failed to consider whether the questioning was voluntary and hence not implicating Fourth Amendment protections. In regard to the first factor, it is clear that *Dunaway* does not state a definitive test for distinguishing a Fourth Amendment seizure from a mere voluntary encounter with the police. In *Dunaway*, this Court did not decide whether or not the accused had been seized; rather, the seizure was assumed in this Court's formulation of the issue of the case, based upon the findings of the lower courts and the concessions of the State. 443 U.S. at 202, 205-206. Since there was no suggestion that the accused in *Dunaway* had consented to accompany the police for questioning, this Court had no occasion to distinguish between voluntary submissions to authorities and constitutional seizures. This Court's enumeration of the characteristics of a traditional arrest in *Dunaway* assumed a finding of a seizure, and purported to distinguish a traditional arrest from an investigative stop, rather than to

distinguish a Fourth Amendment seizure from a voluntary submission to police. Since the Supreme Court of Illinois mistakenly relied upon *Dunaway* to determine whether defendant had been seized, its conclusion was in error. (The intermediate courts of appeals in Illinois have adopted a similar interpretation of *Dunaway*. *See People* v. *Townes*, 94 Ill.App.3d 850, 419 N.E.2d 604 (4th Dist. 1981); *People* v. *Dowdell*, 81 Ill.App.3d 266, 401 N.E.2d 295 (3rd Dist. 1980)).

The second factor in the challenged decision, the court's failure to consider whether the questioning was voluntary, is largely attributable to the Illinois Supreme Court's misperception of the rule announced in *United States* v. *Mendenhall*, 446 U.S. 544 (1980). In *Mendenhall*, two members of the Court expressly stated that a person is seized within the meaning of the Fourth Amendment, "only when by means of physical force or a show of authority, his freedom of movement is restrained," and "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 553-554. Three additional members of the Court voiced their agreement with that standard in *Reid* v. *Georgia*, 448 U.S. 438 (1980), and several federal courts of appeals have followed suit. *See, e.g.*, *United States* v. *Place*, 660 F.2d 44, 48 (2nd Cir. 1981); *United States* v. *Sanford*, 658 F.2d 342, 344-345 (5th Cir. 1981); *United States* v. *Ocheltree*, 622 F.2d 992, 993-994 (9th Cir. 1980). In contrast, the Supreme Court of Illinois has chosen to ignore the *Mendenhall* test for the existence of a Fourth Amendment seizure and has limited its view of that case to the analysis undertaken in the dissenting opinion. Although this Court has not conclusively determined the question, the decision in this case warrants review, since the opinion of the Supreme Court of Illinois conflicts with the approach taken by several federal courts of appeals and which has been approved by a majority of this Court.

The two dissenting Justices in the Illinois Supreme Court adopted a Fourth Amendment analysis consistent with the opinions of this Court. Justice Underwood, joined by Chief Justice Ryan, found that the majority prejudged the issue by referring to the defendant's journey to the police station as a "seizure" and his presence there as a "detention." The dissenters concluded that, under *Mendenhall*, the defendant had not been seized, since his freedom of movement was never restrained and his responses were voluntarily made. The dissenting opinion noted that the defendant's voluntary consent was not negated by the officers' failure to advise him that he could refuse to consent, since knowledge of a right to refuse is not a prerequisite of voluntary consent. *Mendenhall*, 446 U.S. at 577; *Schneckloth* v. *Bustamonte*, 412 U.S. 218 227-234 (1973). In addition, the dissenters found that even if the duration of the questioning would have tended to erode the voluntariness of the defendant's continued cooperation, no unlawful detention resulted, because probable cause to hold the defendant arose during the first interviews.

The question presented for review has never before been squarely presented to this Court, and as such, this Court has not yet conclusively determined when a police officer's request for a citizen to submit to questioning implicates Fourth Amendment protections. The decision of the Supreme Court of Illinois in this case substantially limits a police officer's right to question a citizen on any grounds less than reasonable suspicion to believe that the citizen is involved in criminal activity. From the viewpoint of law enforcement, the precedent established by the Illinois court's decision is particularly onerous, for it seems almost to preclude the consensual questioning of any persons who might later be implicated in the offense under investigation. Very clearly, the challenged decision is in conflict with the approach taken by the federal courts of appeals and which has been approved by a majority of the members of this Court.

The Supreme Court of Illinois erred in finding that the defendant was unlawfully seized, due to its misinterpretation of this Court's opinions relating to the law of constitutional seizures. The defendant was not seized within the meaning of the Fourth Amendment, because he voluntarily consented to accompany the police officers, and there was no hint of threats or compulsion. Soon after he began to talk, probable cause to detain the defendant arose. The mere fact that he was not expressly told that he was free to withhold his cooperation is not controlling as a matter of law, and is practically meaningless under the circumstances. The defendant's freedom of movement was never restrained; he was in fact free to refuse the officers' requests; and no reasonable person could have understood otherwise in view of the officers' conduct.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decision of the Supreme Court of Illinois in this case.

Respectfully submitted,

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June 15, 1982.

Docket No. 54906—Agenda 7—January 1982.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. IVORY J. TOWNES, Appellee.

JUSTICE MORAN delivered the opinion of the Court:

Subsequent to a denial of defendant's pretrial motion to suppress an inculpatory statement he made to the police, a jury in the circuit court of Vermilion County found defendant, Ivory J. Townes, guilty of rape, deviate sexual assault and home invasion in violation of sections 11-1, 11-3 and 12-11 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, pars. 11-1, 11-3, 12-11). Defendant received consecutive sentences of 30 years each on the rape and deviate sexual assault convictions, to run concurrently with a sentence of 10 years' imprisonment for home invasion. The appellate court reversed and remanded the cause for a new trial, holding that the statement made by the defendant to the police should have been suppressed because it was elicited subsequent to an illegal seizure. (94 Ill.App.3d 850). We granted the State leave to appeal.

One issue is raised on appeal: Were defendant's fourth amendment rights violated when, on less than probable cause, he was subjected to a lengthy interrogation at the police station?

The complainant testified that, on January 16, 1980, she awoke at approximately 3 a.m. to find a man standing in her bedroom doorway. He was holding what appeared to be an iron bar and demanded money. After she complied with this demand, he forced her back into bed and committed the sexual acts previously stated. The complainant further testified that, while she was struggling with the man, she hit him on the head with the iron bar and bit his finger.

Soon after the occurrence, the victim was able to give the police only a vague description of her assailant. She indicated

that he was a short black man with a thin build, a moustache, and an "Afro" hair style, and that his lips were "thick and full." Later, she was unable to identify the intruder from a series of photographs shown to her by the police. However, she did point out certain features in the photographs which resembled those of her assailant. On the basis of this information, and their knowledge of "local" people with criminal records, the police compiled a list of possible suspects.

Defendant's name was included on the list, and two Danville, Illinois, police officers visited his residence in Georgetown, Illinois, at approximately 9 a.m. on the day following the incident. One of the officers testified that the defendant was told they "wished to speak to him at the Danville Police Department." When defendnat asked their reason, the officers informed him that they were investigating an entry into an apartment and an assault on a woman. The evidence further disclosed that defendant was given the choice of accompanying the officers in the police car or driving his own car to the station. Defendant chose to ride with the policemen, and they arrived at the station at 9:30 a.m.

Defendant was thereupon taken into an interview room where an officer read to him the *Miranda* warnings. He initialed a form indicating that he understood these rights. Subsequently, the police conducted a series of interviews with the defendant. He was read the *Miranda* warnings prior to each session.

During the initial interview, which began at 9:37 a.m. and lasted until 9:50 a.m., defendant provided an alibi with respect to his whereabouts at the time of the offense. When asked to explain the scratches on his neck, he indicated that he received them while playing with his niece. He also stated that he had a bump on his head because the hood of his car fell on him while he was changing the battery.

A second interview was conducted from 10:27 a.m. until approximately 10:45 a.m. Defendant was again asked to explain his wounds, and whether he would consent to a search of his home and car. Pursuant to his consent, an officer searched his car and discovered two iron bars. He noticed a red substance on one of them, which a laboratory test later revealed was human blood. During the third interview, which began at 11:30 a.m. and lasted about 15 minutes, defendant was asked to display his hands. An officer noticed a mark on his left middle finger, which defendant claimed was caused by a splinter.

At 1:10 p.m. a fourth interview began, during which defendant was informed that an iron bar with blood on it was found in his car. Defendant stated that he was using the bar to pry off a battery cable when the car hood fell on him. He was then asked if he would submit to a medical examination, and defendant indicated that he would. He was transported to a medical center at 2 p.m., where he was requested to give head and pubic hair samples, and fingernail scrapings. The examination revealed scratches and bruises around defendant's neck, a bump on his head, and a bruise on his left middle finger. Defendant was then returned to the police station at 4 p.m. and placed in a lineup. The victim was unable to identify him as her assailant.

A final interview was conducted from 6 p.m. until 10:10 p.m., during which defendant admitted that he was in the victim's apartment and that he had sexual relations with her. However, he maintained that the relations were consensual and that he did not rape her. He further claimed that the victim was not injured when he left her apartment and he thought that any injuries she received resulted from her bumping into something. At the conclusion of the interview, defendant was formally charged. The statements he made during the course of the fifth interview were introduced into evidence at trial by the State.

Defendant, relying on *Dunaway* v. *New York* (1979), 442 U.S. 200, 60 L.Ed.2d 824, 99 St. Ct. 2248, argues that he was illegally seized when, without probable cause, he was interrogated at the police station at various times for a period of more than 12 hours. Since his admissions, it is argued, were the product of an unlawful detention, they should have been suppressed pursuant to defendant's motion. We agree that the circumstances of *Dunaway* are apposite to our case.

In *Dunaway*, the petitioner was transported by the police to the station house, where he was placed in an interrogation room and questioned. The court found that petitioner's detention for custodial interrogation was similar to that which accompanies a traditional arrest. It therefore concluded that he was seized within the meaning of the fourth amendment. Since the seizure was based on less than probable cause, it was held illegal.

Similarly, in the instant case, the defendant's detention resembled a traditional arrest, and the circumstances indicate that a reasonable person would not have believed he was free to leave. As previously noted, defendant was not questioned briefly at his residence. Rather, he was subjected to five different interviews at the police station and remained there from 9:30 a.m. until 10:10 p.m. He was consistently read his *Miranda* rights, which could indicate to a reasonable person that he was in custody on suspicion of criminal activity. The police officers, pursuant to defendant's consent, searched his home and car and confronted him with the fruits of that search. They requested that he submit to a medical examination, and transported him to a local clinic for that purpose. Upon returning to the police station, defendant was placed in a lineup. Although the victim was unable to identify him as her assailant, the defendant was not released but rather was questioned further for four hours. During the hours in which defendant remained at the police station, he was never in-

formed that he could leave or that he was not under arrest. See *Dunaway* v. *New York* (1979), 442 U.S. 200, 212, 60 L.Ed.2d 824, 836, 9 S.Ct. 2248, 2256.

Further, as in *Dunaway*, the seizure of defendant without probable cause had an improper "'quality of purposefulness,'" in that it appears to have been an "'expedition for evidence.'" (442 U.S. 200, 218, 60 L.Ed.2d 824, 839, 99 S.Ct. 2248, 2259, quoting *Brown* v. *Illinois* (1975), 422 U.S. 590, 605, 45 L.Ed.2d 416, 428, 95 S.Ct. 2254, 2262). The circumstances indicate that the officers interrogated the defendant in the hope of obtaining sufficient information upon which to predicate the probable cause necessary for an arrest.

The State concedes that the police lacked probable cause to arrest the defendant at the time they visited his residence. However, it is argued that a finding of probable cause is unnecessary because defendant was never "seized" within the meaning of the fourth amendment. The State, citing *United States* v. *Mendenhall* (1980), 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870, asserts that defendant voluntarily cooperated with the police and therefore any statements that he made were admissible as evidence.

Contrary to the State's assertion, the instant case is clearly distinguishable from *United States* v. *Mendenhall* (1980), 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870. In *Mendenhall*, the Supreme Court held that defendant was not unlawfully seized when she was briefly questioned by two drug-enforcement agents in the concourse of an airport, followed by a consent search. However, this initial confrontation involved the brief, on-the-scene questioning, akin to a "stop," which has been upheld without a showing of probable cause. (*E.g.*, *United States* v. *Brignoni-Ponce* (1975), 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574; *Terry* v. *Ohio* (1968), 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868). Similarly, other cases which have upheld

a search or seizure, unsupported by probable cause, involved limited intrusions which lacked the attributes of an arrest.

For example, in *Michigan* v. *Summers* (1981), __ U.S. __, 69 L.Ed.2d 340, 101 S.Ct. 2587, the court held that where the officers obtained search warrants, issued on probable cause, they were also authorized to detain the occupants of the premises until the search was conducted. It should be noted that the court, in upholding the detention as reasonable, emphasized the fact that the officers had obtained search warrants issued by a netural and detached magistrate. Further, the detention of the defendants involved only a limited intrusion. In the instant case, the continuous questioning to which defendant was subjected clearly exceeded the bounds of a "limited intrusion."

The State next contends that, even if the initial seizure of defendant was illegal, his voluntary cooperation with the police vitiated the taint of the initial illegality. This argument apparently refers to the fact that defendant was consistently read his *Miranda* warnings and chose to waive them. However, it is now well established that administering the *Miranda* warnings does not automatically purge the taint of an illegal seizure. (*E.g., Brown* v. *Illinois* (1975), 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254.) If it were otherwise, "[a]rrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings." 422 U.S. 590, 602, 45 L.Ed.2d 416, 426, 95 S.Ct. 2254, 2261.

Accordingly, we hold that defendant's fourth amendment rights were violated when, without probable cause, he was subjected to a lengthy interrogation at the police station. Since the elicited statements were a product of the unlawful deten-

tion, defendant's motion to suppress should have been granted.

For the reasons stated herein, the judgment of the appellate court is affirmed.

Judgment affirmed.

JUSTICE UNDERWOOD, dissenting:

I disagree with the result reached by my colleagues.

Assuming, as I do, that an individual's presence at a police station and responses to questions may still be voluntary even though requested by a police officer (*United States* v. *Mendenhall* (1980), 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870; *Reid* v. *Georgia* (1980), 448 U.S. 438, 65 L.Ed.2d 890, 100 S.Ct. 2752; *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 225, 36 L.Ed.2d 854, 861, 93 S.Ct. 2041, 2046), the fundamental issue in this case is whether defendant's actions in going to the station and participating in the questioning were voluntarily undertaken. The majority, however, pre-judges that issue by referring to defendant's journey to the station as a "seizure," and his presence there as "detention." Those terms imply the use of force or the exercise of restraint (*Terry* v. *Ohio* (1968), 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1869), and this record simply will not support such inferences.

The Supreme Court has repeatedly recognized police questioning as a necesary tool in the effective enforcement of the criminal laws. (*Mendenhall; Schneckloth; Haynes* v. *Washington* (1963), 373 U.S. 503, 515, 10 L.Ed.2d 513, 521, 83 S.Ct. 1336, 1344). The question of the circumstances under which, and the extent to which, investigative questioning is permissible in the absence of probable cause is a troublesome one for the courts as the cited cases indicate. Given the volume of disagreement among judges at all levels, the resulting problems for those engaged in investigating crime are obvious.

(*Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 250, 36 L.Ed.2d 854, 876, 93 S.Ct. 2041, 2059 (Powell, J., joined by the chief justice and Rehnquist, J., concurring).) It is settled, however, that the police officer need not preface his noncustodial questions or requests with an explanation to the person addressed that he need not answer or comply. *Schneckloth* so held, and no case since then disclaims that holding. Even the dissenters in *Mendenhall* acknowledged that the prosecution "need not prove that [defendant] knew she had a right to refuse to accompany the officers ***." 446 U.S. 544, 577, 64 L.Ed.2d 497, 524, 100 S.Ct. 1870, 1889 (White, J., joined by Brennan, Marshall and Stevens, JJ., dissenting).

In his opinion in *Mendenhall* announcing the judgment of the court and joined by Justice Rehnquist, Justice Stewart discussed the distinction between "seizures" of the person and encounters which did not intrude upon constitutionally protected interests. Quoting language from earlier cases to the effect that only when an officer has exerted force or shown authority in restraining the liberty of an individual has a seizure occurred, and that policemen are at liberty to ask questions of any one on the streets, he leaves no doubt that, in his judgment, "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." (446 U.S. 544, 554, 64 L.Ed.2d 497, 509, 100 S.Ct. 1870, 1877.) Justice Powell, with whom the chief justice and Justice Blackmun joined, concurred in the result without joining in part II-A of Justice Stewart's opinion holding no seizure occurred and that the defendant's responses were voluntarily made. Justice Powell specifically noted, however (446 U.S. 544, 560 n.1, 64 L.Ed.2d 497, 513 n.1, 100 S.Ct. 1870, 1880 n.1), that the nonjoinder did not necessarily indicate disagreement. In his later concurring opinion, again joined by the chief justice and

Justice Blackmun, in *Reid* v. *Georgia* (1980), 448 U.S. 438, 442-43 65 L.Ed.2d 890, 895-96, 100 S.Ct. 2752, 2754-55, Justice Powell again referred to the *Mendenhall* concurrence, indicating that the issue whether the questioning in *Reid* constituted a seizure or was voluntarily submitted to was open for consideration by the State courts. Given the majority positions in *Mendenhall* and *Reid*, coupled with the *Mendenhall* minority's admission that the *Schneckloth* holding remained viable, there seems to me no doubt that the absence of an explanation to a possible suspect of his right to remain at home and refuse to answer questions cannot foreclose the possibility that his presence at the police station, even though in response to a police request, may still be voluntary. As noted in *Schneckloth* the suggestion that an explanation was essential "has been almost universally repudiated by both federal and state courts, and, we think, rightly so." (412 U.S. 218, 231, 36 L.Ed.2d 854, 865, 93 S.Ct. 2041, 2049-50. See also *United States* v. *Watson* (1976), 423 U.S. 411, 424, 46 L.Ed.2d 598, 609, 96 S.Ct. 820, 828, indicating that the absence of an explanation of the right to refuse a request to consent to a search was not of controlling significance in determining the voluntariness of the subsequent consent.) While others of the cited cases also concern the voluntary nature of consented-to searches, rather than the combination of consented-to questioning and searches presented here, that difference is not consequential. *United States* v. *Mendenhall* (1980), 446 U.S. 544, 555-56, 577, 64 L.Ed.2d 497, 510, 524, 100 S.Ct. 1870, 1878, 1889 (Stewart, J., joined by Rehnquist, J., concurring, and White, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041.

Nor am I aware of anything in either the State or Federal constitutions which precludes officers investigating a recently committed, serious crime from going to private homes at

reasonable hours to ask the occupants questions regarding that crime. Recognition and approval of that practice in the context of a consent to search was indicated by the Supreme Court in quoting with approval from *People* v. *Michael* (1955), 45 Cal. 2d 751, 754, 290 P.2d 852, 854: "'[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes.'" (*Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 230, 36 L.Ed.2d 854, 864, 93 S.Ct. 2041, 2049; *United States* v. *Mendenhall* (1980), 446 U.S. 544, 553, 64 L.Ed.2d 497, 508-09, 100 S.Ct. 1870, 1876-77.) When one of those occupants resembles a general description by the victim and has a record of similar offenses, I would think good police practice would dictate that an officer with no more specific clues should attempt, in a reasonable manner, to interview him even though probable cause, as such, does not exist. Too, no constitutional guarantees known to me bar asking that individual if he is willing to talk to the officers at the station where, as here, there is not the slightest hint of coercion. Of course, the individual to whom such questions or requests are addressed may refuse. If, however, he elects to cooperate, the simple fact that his cooperation was requested by an officer does not prevent use of its results. (*Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041; *United States* v. *Watson* (1976), 423 U.S. 410, 425, 46 L.Ed.2d 598, 609-10, 96 S.Ct. 820, 828.) "It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily." *United States* v. *Mendenhall* (1980), 446 U.S. 544, 555-56, 64 L.Ed.2d 497, 510, 100 S.Ct. 1870, 1878.

It is not contended here that the officers had probable cause to arrest defendant at the time they went to his home on the morning of January 17. They testified they were simply investigating the crime, and that defendant's name was fifth on

a list of "possibles" whom they were interviewing. Some persons on the list had been interviewed the preceding day, found to bear no evidence of injuries, and cleared. Defendant was on the list because he fit, in a general fashion, the description given by the victim of her assailant and had a record of involvement in similar offenses. The officers testified that defendant was not arrested and was free to return home had he so requested on the trip to Danville. In fact, defendant testified that the officers, whom he knew, urged him to drive his car, but his mother needed it so he rode with them. Before they went, defendant left and "washed up" while the officers visited with his mother. Too, defendant admits that he understood and voluntarily waived his *Miranda* rights when they were later explained to him and that he did not at any time inform any officer that he wanted to return home or stop talking. While he did testify that he told the police he wanted a lawyer, the officers testified to the contrary, and the trial judge found their testimony more worthy of belief, a finding which is obviously not contrary to the manifest weight of the evidence. It is to me entirely clear that defendant voluntarily accompanied the officers to the Danville police station, and that he, therefore, was not "seized" as the majority indicates.

While my colleagues appear to concede that some limited questioning would have been permissible, they conclude, it seems, that at some undetermined point after his arrival at the station, those permissible limits were exceeded. The precise holding is "that defendant's fourth amendment rights were violated when, without probable cause, he was subjected to a lengthy interrogation at the police station." (Slip op at 5.) Had probable cause been absent during the greater part or all of the questioning, I would agree, but the troublesome part of this holding is that is seems to ignore the fact that while probable cause did not exist at the time of defendant's arrival at the station, it did arise early in the questioning and defendant could thereafter have been detained without his consent.

Defendant had signed a consent to search his car at 9:37 a.m., almost immediately upon his arrival at the station, and that search produced a tire iron with blood on it. The precise time at which probable cause arose may be debatable, but certainly it arose no later than the discovery of the bloodied tire iron in defendant's car. At that point defendant's neck scratches and head and finger wounds, as observed by the officers, corresponded with the victim's statement regarding her struggles with her assailant and that she had bitten him on the finger and hit him on the head with the iron bar. Too, the victim had told police her assailant had worn a large ring, and the officers had observed such a ring on defendant's hand when they arrived at his home. After he "washed up" before leaving home, he was no longer wearing the ring. Given these circumstances, coupled with the fact that defendant's physical appearance generally fit the description given by the victim, the subsequent detention and interrogation cannot, in my opinion, be said to be without probable cause. (See *United States* v. *Watson* (1976), 423 U.S. 415, 417-18, 46 L.Ed.2d 598, 605-06, 96 S.Ct. 820, 824-25; *Brinegar* v. *United States* (1949), 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302; *People* v. *Robinson* (1976), 62 Ill.2d 273; *People* v. *Clay* (1973), 55 Ill.2d 501; 1 LaFave, Search and Seizure sec. 3.2 (1978).) The fact that the victim was unable to identify defendant in the lineup later that day did not, it seems to me, eliminate the existing probable cause. The victim had told the officers she did not get a good look at her assailant's face. The lights were off during the assault except for several brief periods when defendant turned one on after telling her not to look at him. Because of the severe beating she had received, she obeyed. Too, she was without the contact lens which she normally wore because of nearsightedness. Given these circumstances, her inability to identify defendant is not surprising, nor does it, in my judgment, affect the continued existence of probable cause. See 1 LaFave, Search and Seizure sec. 3.2 (1978); see also *State* v.

McClinton (1975), 265 S.C. 171, 217, S.E.2d 584 (evidence sufficient to sustain defendant's conviction despite prosecutrix' inability to identify him as her attacker where corroborative facts included a bitten hand); *Jeffers* v. *State* (1980), 268 Ark. 329, 595 S.W.2d 687 (evidence sufficient to sustain defendant's convictions despite prosecutrix' inability to identify him as her masked assailant).

The cases relied on by the court do not require the result it reaches. There is no resemblance between *Brown* v. *Illinois* (1975), 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254, and this case, for there the police broke into the defendant's apartment without a warrant, searched it, arrested the defendant at gunpoint, handcuffed him, and took him to the station. There is also what seems to me to be a significant difference from *Dunaway* v. *New York* (1979), 442 U.S. 200, 203, 60 L.Ed.2d 824, 829, 99 S.Ct. 2248, 2251, in that the three officers in *Dunaway* would not have permitted defendant to leave their custody for they had been instructed to "'pick up' petitioner and 'bring him in.'" (See also *People* v. *Creach* (1980), 79 Ill.2d 96, 101, *cert. denied* (1980), 449 U.S. 1010, 66 L.L.Ed.2d 467, 101 S.Ct. 564). Here, on the contrary, the testimony is undisputed that no coercion was used and that defendant was free to refuse to go to the station and would have been permitted to leave, at least in the initial stages of the interrogation.

In my judgment defendant voluntarily accompanied the officers and participated in the initial interrogative stages leading to the discovery of the bloodied tire iron. With that discovery, probable cause arose to believe him guilty of the rape, and the subsequent questioning was justified. The incriminating statements were, accordingly, properly admitted.

I would reverse the judgment of the appellate court and affirm the judgment of the circuit court of Vermilion County.

CHIEF JUSTICE RYAN joins in this dissent.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 16409

THE PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE,
v.
IVORY J. TOWNES,
DEFENDANT-APPELLANT.

Appeal from
Circuit Court
Vermilion County
80-CF-25
Honorable
Paul M. Wright,
Judge Presiding.

Mr. JUSTICE WEBBER delivered the opinion of the court:

A jury in the circuit court of Vermilion County rendered verdicts against the defendant finding him guilty of the offenses of rape, deviate sexual assault, and home invasion in violation of sections 11-1, 11-3 and 12-11 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, pars. 11-1, 11-3 and 12-11). Judgments were entered on the verdicts, post-trial motions denied and defendant was sentenced to imprisonment, 30 years for rape, 30 years for deviate sexual assault (these sentences to run consecutively), and 10 years for home invasion (this sentence to run concurrently with the others.) This appeal followed.

Defendant's principal contention on appeal is that his early admissions to law enforcement officers should have been suppressed pursuant to his motion made for that purpose on the ground that he had been seized within the meaning of *Dunaway* v. *New York* (1979), 442 U.S. 200, 60 L. Ed. 2d 824,

99 S. Ct. 2248. Other issues raised on appeal will be discussed at a subsequent point in this opinion.

The evidence disclosed that the complaining witness was awakened in her apartment at about 3 a.m. by a man who was holding an iron bar and demanding money. Following threats and a beating, the actions which led to the charges described above occurred. The complainant was unable to give a description of her assailant other than that he was a black man, not very tall, "lean" or "thin built," had a moustache and lips which were "thick and full." In the course of the struggle the complainant was able to seize the iron bar and struck the intruder behind the ear with it. She also bit his hand. Police investigation corroborated the events which she said had taken place, and medical evidence revealed the presence of semen and severe injuries to the face and neck of the complainant.

Later in the morning the police showed to the victim a series of photographs but she was unable to identify the intruder other than pointing out features in the photographs which were similar to those of her attacker. On the basis of her description and on the limited information elicited from her inspection of the photographs, the police compiled a list of eight "possible suspects." Also utilized in making the compilation was the knowledge of certain detectives of local people with criminal backgrounds. Defendant was included in the list.

The police then began to interview the persons on the list by visiting them at their residences. They came to defendant's home in Georgetown on the day following the events in the apartment, and informed him that they would like to talk to him at the stationhouse at his convenience regarding "an entry into a home and an assault on a woman." It was first suggested that he use his own car to drive to the station but defendant elected to ride with the police so that his mother would

have the use of his car. He was permitted to clean up before leaving home. He was not arrested, searched or stripped. According to the police testimony, he was simply part of an investigation which would involve at least seven other black men of the same general description.

Upon arrival at the stationhouse, an officer read to defendant his *Miranda* rights and defendant initialed a form which set forth those rights. At 9:37 a.m. the first interview began and lasted 13 minutes. Defendant's statement was largely alibi in nature and exculpatory as to his wounds.

A second interview began at 10:27 a.m. and lasted about 20 minutes. During it defendant repeated his first story and gave consent to search his car and his room. The *Miranda* warnings were said to be still in effect.

A third interview, with an affirmation of *Miranda*, began at 11:30 a.m. and lasted about 14 minutes. There was discussion about a wound on defendant's head which he explained as having resulted from a splinter.

A fourth interview, again preceded by an affirmation of *Miranda*, began at 1:10 p.m. and lasted four minutes. During the interview defendant was shown a tire iron recovered from his car and apparently marked with blood. He stated that the iron was his and the blood came from an accident when the hood of his car fell upon him. He agreed to a medical examination which revealed several scratches and bruises around his neck, a bump on the back of his head and bruises around both sides of his left middle finger.

At about 4 p.m. defendant was returned to the police station after the medical examination and was placed in a lineup for observation by the victim. She was unable to identify him.

A fifth interview began just before 6 p.m. and lasted until 10:10 p.m. Defendant was again warned of his *Miranda* rights and agreed to speak with the police. This time he admitted be-

ing in the victim's apartment but maintained that the relations were consensual. When asked about the victim's injuries, defendant denied causing them and suggested that she had bumped into something. He claimed that she was uninjured when he left the apartment. Following this interview defendant was booked.

The statement made during this fifth interview was transcribed and introduced at trial as a People's exhibit. At trial, defendant testified that he did choke and beat the victim but denied that the sexual acts were compelled by his violence. Rather, he said, the sexual relations followed the beating in order for the parties to make up.

Defendant on appeal argues that his case is controlled by *Dunaway*. We agree. That case is factually close to the instant one. In *Dunaway*, the officers admitted that they did not have enough evidence to obtain a warrant but proceeded to pick the defendant up and bring him in to the station. He was not told that he was under arrest, although the officers testified that he would have been restrained if he had attempted to leave. The Supreme Court discussed the requirement of probable cause for arrest and the narrow exception involved in *Terry* v. *Ohio* (1968), 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868. The court found no facts in *Dunaway* which would justify a *Terry*-type stop and concluded that the interrogation and detention intruded so severely on fourth amendment rights of the defendant as to trigger the safeguards against illegal arrest.

We are unable to discern any substantial distinction between *Dunaway* and the instant case. Here the police had no probable cause to arrest or detain the defendant. His only connection with the events under investigation was that he matched generally a general description given by the victim. The officers themselves testified that there was no intention to arrest him and viewed him only as a "possibility." Yet the defendant was detained for over 12 hours and subjected to 5

separate interrogations until sufficient incriminating statements were obtained to serve as a predicate for arrest. Defendant was never told that he was not under arrest, and likewise was never told that he was free to go at any time. While the latter are not controlling, yet they are significant factors to be considered in the totality of the circumstances.

As in *Dunaway*, there appears a secondary question as to whether the giving of the *Miranda* warnings at each of the five interviews was sufficient to vitiate the illegality of the arrest. In *Dunaway*, the Supreme Court discussed *Brown* v. *Illinois* (1975), 422 U.S. 590, 45 L. Ed 2d 416, 95 S. Ct. 2254. *Brown* held that where there has been an illegal arrest the giving of the *Miranda* warnings cannot *per se* attenuate the taint and validate the subsequent admissions. The *Dunaway* court relied on *Brown* and held that no intervening event broke the connection between the illegal detention and the confession. It also pointed out that the exclusionary rule serves different purposes in effectuating policies under the fourth and fifth amendments. A voluntary statement for purposes of the fifth amendment is only a threshold requirement for purposes of the fourth. "Indeeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached." 442 U.S. 200, 217, 60 L. Ed. 2d 824, 839, 99 S. Ct. 2248,

It is admitted in the instant case that the *Miranda* warnings were given at each interview, but as in *Dunaway* that disposes only of the threshold requirement in judging the validity of the initial detention. That detention was illegal and nothing occurred afterwards to vitiate the taint.

Dunaway was followed in this State by *People* v. *Dowdell* (1980), 81 Ill. App. 3d 266, 401 N.E. 2d 295. The facts were much the same as in the instant case. The officers testified that the defendant had not been arrested and that they had no probable cause for arrest. It was undisputed that the defen-

dant was never told that he was, or was not, under arrest. Likewise, he was never advised that he need not accompany the officers to the station. In reversing a denial of defendant's motion to suppress his statement, the court in *Dowdell* focused on the fact that the officers never communicated to the defendant that he was free not to accompany them. "To suggest the defendant was not seized or detained merely because after the fact the police officers disclaimed any intention of arresting the defendant would permit the evasion of fourth amendment protections." 81 Ill. App. 3d, 266, 270, 401 N.E.2d 295, 297-298.

In *People* v. *McMahon* (1980), 83 Ill. App. 3d 137, 142, 403 N.E.2d 781, 784, the court found no appreciable difference from *Dunaway* and reversed a denial of the defendant's motion to suppress, saying:

> "Both cases involve situations where the defendant was told to accompany police officers to the station for questioning. In both cases, the defendant was not handcuffed, but neither was he told he was free to go. In both cases, the defendant, after receiving and waiving his *Miranda* rights, made incriminating statements which were used against him at trial. In both cases, the defendant was not 'booked' and further processed until after statements were made. Just as there was an arrest in *Dunaway*, there was an arrest in the instant case."

We follow the authority of *Dunaway*, *Dowdell*, and *McMahon* and hold that it was error not to suppress defendant's admissions in the instant case. The error is sufficiently grave as to require a new trial.

Defendant has raised several other issues for our consideration. However, in view of our holding on the seizure issue discussed above, none of them will require extended comment. The matters of the alleged failure of the State to supply

discovery and of the purported incompetency of the defendant suggested after trial but before sentencing will not arise on retrial. In any event we find no substance to them.

Defendant's final complaints relate to sentencing. He maintains that the imposition of consecutive sentences was an abuse of discretion by the trial court. We disagree.

Section 5-8-4(a) of the Unified Code of Corrections provides in pertinent part:

> "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, in which event the court may enter sentences to run consecutively." Ill. Rev. Stat. 1979, ch. 38, par. 1005-8-4(a).

The defendant argues that the trial court abused its discretion in entering consecutive sentences on charges of rape and deviate sexual assault because he did not inflict "severe bodily injury" on the victim.

The supreme court has repeatedly held that the trial judge is normally in a better position to determine the punishment to be imposed than the courts of review. (*People* v. *Perruquet* (1977) 68 Ill. 2d 149, 368 N.E.2d 882.) In the instant case, there was ample evidence in the record to document the injuries of the complainant. It was the testimony of the first witness to see the victim, that the complainant's face was "beaten up" and that her eye was almost swollen closed. There was also evidence from the testimony of the doctor who observed the plaintiff's facial injuries and ordered X rays to investigate the possible bone damage that might have been

done. Finally, there are pictures of the plaintiff which are a part of this record. These clearly indicate that the injuries inflicted during the course of the commission of these Class X felonies were severe.

We find no reason to disturb the trial court's discretion in this matter.

Finally, defendant contends that section 5-8-4 of the Unified Code of Corrections is unconstitutionally vague. We do not agree. "Severe bodily injury" is a term generally understood. Similar terms, such as "great bodily harm" and "severe personal injury," have been used without difficulty. (*People* v. *Chambers* (1973), 15 Ill. App. 3d 23, 303 N.E.2d 24; *People* v. *Cavanaugh* (1957), 18 Ill. App. 2d 279, 152 N.E.2d 266.) Application of the term is guided by standards of common usage and it is as precise as modern idiom will allow. The statute enjoys a presumption of constitutionality and defendant has presented insufficient evidence or argument to overcome the presumption.

The judgment of the circuit court of Vermilion County is reversed and the cause is remanded for new trial.

Reversed and remanded.

TRAPP, P.J., and GREEN, J., concur.

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No. 81-2703

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

IVORY J. TOWNES,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1981

No. 81-2307

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PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

IVORY J. TOWNES,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Respondent, Ivory J. Townes, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the Supreme Court of Illinois entered in this case on April 16, 1982, be denied.

QUESTION PRESENTED

WHETHER THE INTERMEDIATE AND SUPREME APPELLATE COURTS OF ILLINOIS ERRED IN HOLDING THAT A DEFENDANT WHO, WITHOUT PROBABLE CAUSE, WAS ESCORTED FROM HIS HOME TO A POLICE STATION AND HELD FOR SOME THIRTEEN HOURS FOR PURPOSES OF INTERROGATION UNDER CIRCUMSTANCES RESEMBLING A TRADITIONAL ARREST,

AND UNDER WHICH A REASONABLE PERSON WOULD NOT HAVE BELIEVED THAT HE WAS FREE TO LEAVE, WAS ILLEGALLY SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT BAN ON UNREASONABLE SEIZURES.

STATEMENT OF THE CASE

On the morning of January 6, 1980, at approximately 5:15, a neighbor of the complainant phoned the Danville, Illinois, Police Department to report that the complainant's apartment had been broken into and that she claimed to have been raped. The complainant, who later told police the assailant had been present at her apartment from 2:59 until 5:38 a.m., was able to give police only a very general description of the alleged assailant. She was unable to select the person who allegedly attacked her from mug shots exhibited by police. She did, however, point out several photographs of men whose size and features were similar to those of her alleged assailant.

After talking with complainant, police had no firm suspects. Instead they determined to seek out those men whose photographs complainant had pointed out, as well as certain others whose names they added to the possible suspect list based on past contacts. They interviewed at least four persons from the total list before reaching Respondent's name. Two of the initial interviews were, like Respondent's, conducted at the police department.

At approximately 9:10 a.m. on the day following the alleged attack, two Danville officers journeyed to Respondent's home, which was located two

towns south of Danville. The officers had no warrant for Respondent's arrest, nor probable cause to arrest him. Their investigation had not focused on any one individual. Respondent was considered one "possibility" among several. After identifying themselves, the officers asked Respondent to accompany them to the station for questioning, either in their vehicle or his. They told Respondent that an investigation was under way into an entry into a home and an assault on a woman. They did not tell him that he had a choice whether to go to the station. Respondent chose to ride with them, rather than to drive his own car.

At the station, police advised Respondent of his Miranda rights, took a written waiver, and began to interview him. Their interrogation continued all morning, with periodic breaks for liquid refreshments, food, and trips to the restroom, and finished at approximately 1:15 p.m. Respondent then was asked to accompany police to a local hospital for a physical examination, where he was taken at about 2:00 p.m. He was returned for further interrogation at approximately 4:00 p.m. At about 5:00 p.m., Respondent and four other persons of Respondent's approximate appearance and size were included in a line-up from which the complainant was unable to make an identification.

At approximately 6:00 p.m., having already spent some nine hours in police custody, Respondent admitted to knowing the complainant and to having had sexual relations with her. He denied the forcible nature of those relations and asserted a pre-existing intimate relationship. Police then questioned Respondent at length about his contacts with the complainant.

Interrogation finally ended at 10:10 p.m., approximately thirteen hours after police first appeared at Respondent's residence, and some 12 1/2 hours after Respondent first arrived at the station.

Respondent moved pre-trial to suppress his statements, which constituted the only evidence directly linking him to the alleged offense. In denying that motion, the trial court ruled not that Respondent had voluntarily accompanied police, but that the police "had probable cause to proceed as they did."

The Appellate Court unanimously reversed Townes' conviction, 94 Ill.App.3d 850, 419 N.E.2d 604 (4th Dis. 1981), noting that there are no substantial differences between the facts of this case and those in Dunaway v. New York, 442 U.S. 200 (1979). The Supreme Court of Illinois, by a 5-2 vote, sustained the Appellate Court, noting that "defendant's detention resembled a traditional arrest, and the circumstances indicate that a reasonable person would not have believed he was free to leave," thereby rejecting the State's argument on permissive appeal to that court that the defendant voluntarily cooperated with the investigation. People v. Townes, 91 Ill.2d 32, 435 N.E.2d 103 (1982).

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

PETITIONER'S STATEMENT OF THE REASONS FOR GRANTING REVIEW MISCONSTRUES THE FACTUAL FINDINGS AND OPINIONS BELOW, SEEKS FOR THE FIRST TIME BEFORE THIS COURT TO RAISE AS AN ISSUE THAT WHICH IT NOW CLAIMS TO BE DETERMINATIVE OF THIS CAUSE, AND SERIOUSLY MISINTERPRETS THE DECISIONS OF THIS COURT AND OF THE FEDERAL COURTS OF APPEALS CITED IN PETITIONER'S APPLICATION.

Petitioner's statement of the issue presented by this case glosses over the very important distinction between custodial interrogations, which require probable cause, and brief, investigatory questioning on reasonable suspicion.

Both courts below found Dunaway v. New York controlling on the facts, the Appellate Court stating that it was "unable to discern any substantial distinction between Dunaway and the instant case", and the Illinois Supreme Court ruling that "defendant's detention resembled a traditional arrest, and the circumstances indicate that a reasonable person would not have believed he was free to leave." As noted in Judge Kaufman's dissenting opinion in United States v. Place, 660 F.2d 44 (1981), Dunaway establishes that custodial interrogation such as occurred in this case "must be supported by probable cause." Police in this case possessed neither probable cause nor anything but a generalized suspicion which had not focused on Respondent.

As correctly noted by the Illinois Supreme Court, this case is clearly distinguishable from United States v. Mendenhall, 446 U.S. 544 (1980). Nor is it like the federal appellate cases cited in Petitioner's brief, each of which, as well as Mendenhall, deal with brief investigatory encounters of persons fitting the DEA drug courier profile.

In reality, the decisions below are squarely in line with the controlling decisions of this court. Reversing the Illinois Supreme Court would necessitate this Court's rejecting the factual determinations reached below.

CONCLUSION

Since the decisions of the Illinois Appellate and Supreme Courts are thoroughly in line with controlling decisional law of this Court, since the petition for certiorari raises no issue of law not decided below in accordance with such controlling law, and since to reverse the decisions below, this Court would have to reach factual conclusions contrary to those below, the petition for writ of certiorari should be denied.

Respectfully submitted,

KENNITH W. BLAN, JR.
4 Vermilion Park Mall
Danville, IL 61832
(217) 443-5400
Counsel for Ivory J. Townes,
Respondent

CERTIFICATE OF SERVICE

I, Kennith W. Blan, Jr., hereby certify that one copy of the foregoing Brief of Respondent Opposing Petition for Writ of Certiorari to the Supreme Court of Illinois was served this 2nd day of July, 1982, by depositing the same in the United States Mail at Danville, Illinois, in an envelope securely sealed, postage prepaid, and legibly addressed to Mr. Michael B. Weinstein, Assistant Attorney General, 188 West Randolph Street, Suite 2200, Chicago, IL 60601, and to Mr. Robert J. Biderman and Mr. James K. Horstman, State's Attorney's Appellate Service Commission, Suite 909 - Myers Building, Springfield, IL 62701.



KENNITH W. BLAN, JR.

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No. 81-2307

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

Ivory J. Townes,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now Respondent, by counsel, pursuant to Rule 46, and prays that he be allowed to proceed in forma pauperis, attaches hereto his affidavit in the form prescribed by the Rules of Appellate Procedure, form 4, and shows that he has not previously sought leave to proceed in forma pauperis.

IVORY J. TOWNES, Respondent.

BY: BLAN LAW OFFICES

BY _____
One of His Attorneys

KENNITH W. BLAN, JR.
Blan Law Offices
Attorneys for Respondent
4 Vermilion Park Mall
Danville, IL 61832
(217) 443-5400

CERTIFICATE OF SERVICE

I, Kenńith W. Blan, Jr, hereby certify that one copy of the foregoing Motion to Proceed in Forma Pauperis was served this 2nd day of July, 1982, by depositing the same in the United States Mail at Danville, Illinois, in an envelope securely sealed, postage prepaid, and legibly addressed to Mr. Michael B. Weinstein, Assistant Attorney General, 188 West Randolph Street, Suite 2200, Chicago, IL 60601, and to Mr. Robert J. Biderman and Mr. James K. Horstman, State's Attorney's Appellate Service Commission, Suite 909 - Myers Building, Springfield, IL 62701.

KENNITH W. BLAN, JR.

No. 81-2307

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

People of the State of Illinois,

Petitioner,

v.

Ivory J. Townes

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF ILLINOIS)
) ss
COUNTY OF LIVINGSTON)

I, Ivory J. Townes, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I succeeded on appeal before the highest court of Illinois; and, that I am submitting herewith a brief in opposition to the State's Petition for Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No. Respondent is presently incarcerated. Prior to that time, Respondent was employed at various laborer jobs.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Ivory J. Townes
IVORY J. TOWNES

SUBSCRIBED and SWORN to before me this 23 day of June, 1982.

Notary Public

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Justice